

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NAZARIO HERNANDEZ,  
Appellant,

v.

FRANKLIN CREDIT MANAGEMENT  
CORP and DEUTSCHE BANK NATIONAL  
COMPANY AS TRUSTEE FOR BOSCO  
CREDIT II TRUST SERIES 2010-1,

Appellees.

Dist. Ct. No: 2:19-cv-00207-JCC

Internal Bankruptcy No. 19-S003

Related Case: No.: 18-01159-TWD

Chapter: 13

REPLY IN SUPPORT OF MOTION  
FOR APPELLANT'S ATTORNEY  
FEES

Noted on Motion Calendar for:

September 13, 2019

Appellees have objected to Appellant Nazario Hernandez's motion to this court for attorney fees on the basis that this Court is unable to award attorney fees and costs, arguing that the Bankruptcy court is the proper place for such a motion to be decided. Appellant will address this argument, but first it should be noted that Appellees have not objected to either the hourly

1 rate or the itemization of time in the Motion for Fees, and they should therefore be found to have  
2 waived any objection to reasonableness of those fees.

3 Federal Rule of Bankruptcy Procedure 7054 specifically states that Federal Rule of Civil  
4 Procedure 54(d)(2)(A)-(C) and (E) apply in adversary proceedings (except for the reference to  
5 rule FRCP 78), meaning FRCP 54(d)(2) as cited by Appellant is applicable to this motion for  
6 fees. Appellees argue that Hernandez is only entitled to costs under FRBP 8021, but this would  
7 subsume FRBP 7054 as it specifically adopts FRCP 54's broader award of attorney fees (when  
8 supported by other law) in the context of an adversary proceeding (which is the procedural  
9 standing of this case). At best, FRBP 8021 means that only the bankruptcy court can award the  
10 enumerated costs in FRBP 8021(c), which in this case would include the charge for the  
11 transcript. Also, Local Civil Rule for the Western District of Washington 54(d)(5) states that "A  
12 motion for attorney's fees should not be included in the motion for costs to the clerk but should  
13 be directed to the court pursuant to Fed. R. Civ. P. 54(d), which sets forth requirements for the  
14 timing and contents of the motion.

15 Confusingly, Appellees claim that Appellant has cited to a case which it did not mention:  
16 *Stevens v. Security Pacific Corp.*, 53 Wash App 507 (1989). Appellees appear to be citing this  
17 case because it analyzes an attorney fee clause similar to the one at issue here. However, Exhibit  
18 2 to the Declaration of Jacob DeGraaff, filed with the motion for fees, contains the full note and  
19 deed of trust. The note and deed of trust contain several other attorney fee provisions, including  
20 paragraph 7 of the Deed of Trust (page 25 of Decl. of DeGraaff) which states: "If Borrower fails  
21 to perform the covenants and agreements contained in this Deed of Trust, or if any action or  
22 proceeding is commenced which materially affects Lender's interest in the Property, then  
23 Lender, at lender's option, upon notice to Borrower, may make such appearances, disburse such  
24

1 sums, including reasonably attorneys' fees, and take such action as is necessary to protect  
 2 lender's interest. . . . Any amounts disbursed by lender pursuant to this paragraph 7, with interest  
 3 thereon, at the Note rate, shall become additional indebtedness of Borrower secured by this Deed  
 4 of Trust." In other words, under the Deed of Trust, Borrower is plainly liable for Lender's  
 5 attorneys' fees incurred in enforcing and protecting its interests. RCW 4.84.330 makes this  
 6 attorneys' fees provision reciprocal. It would make a mockery of Washington's reciprocal  
 7 attorney fee statute to require, as Appellees seem to suggest, that in order for the borrower to  
 8 recover attorney fees, the lender must first have demanded attorney fees.

9 Contrary to Appellees' assertion, this Court, the United States District Court for the  
 10 Western District of Washington, has the authority and jurisdiction to award fees on appeals that  
 11 come before it. If it didn't, the District Court would be unable to award fees for a frivolous  
 12 appeal under FRAP 38. See *In re Del Mission Ltd.*, 98 F.3d 1147, 1153 (9th Cir. 1996) ("We  
 13 agreed with the BAP's holding that Rule 38 empowers *only appellate courts, not bankruptcy*  
 14 *courts* to award damages, attorney's fees, and other expenses incurred by an appellee in response  
 15 to a frivolous appeal . . . . [m]oreover, . . . an appellate court does not have the authority to  
 16 delegate this power to a bankruptcy court." (Internal citations omitted.)) If, as Appellee's  
 17 propose, FRBP 8021 were the only means by which Appellant could recover costs, FRAP would  
 18 be rendered inapplicable to bankruptcy appeals.

19 Appellees have not challenged the rate or hours billed in the motion for fees. Instead,  
 20 they have asserted that this court is not the proper court to decide the matter of fees. *Penrod* and  
 21 RCW 4.84.330 make clear that the attorney fees provision at issue is reciprocal, and that the  
 22 present appellate fees are taxable to the Appellees in this court. Appellant respectfully requests  
 23  
 24

1 this court enter an order taxing his fees and costs to Appellees, or in the alternative, that the  
2 matter be remanded to the Bankruptcy Court for entry of such an order.

3 Respectfully submitted this 13<sup>th</sup> day of September, 2019.

4 /s/ Jacob D. DeGraaff

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